

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1162

To be argued by
JANE W. PARVER

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1162

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALFRED CATINO,

Defendant,

PUBLIC SERVICE MUTUAL INSURANCE COM-
PANY, ANTHONY CATINO, THERESA PEDUTO,
MARY MARICCIO and JERRY DE FEO,

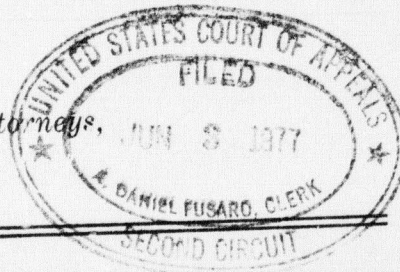
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

JANE W. PARVER,
JAMES P. LAVIN,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*



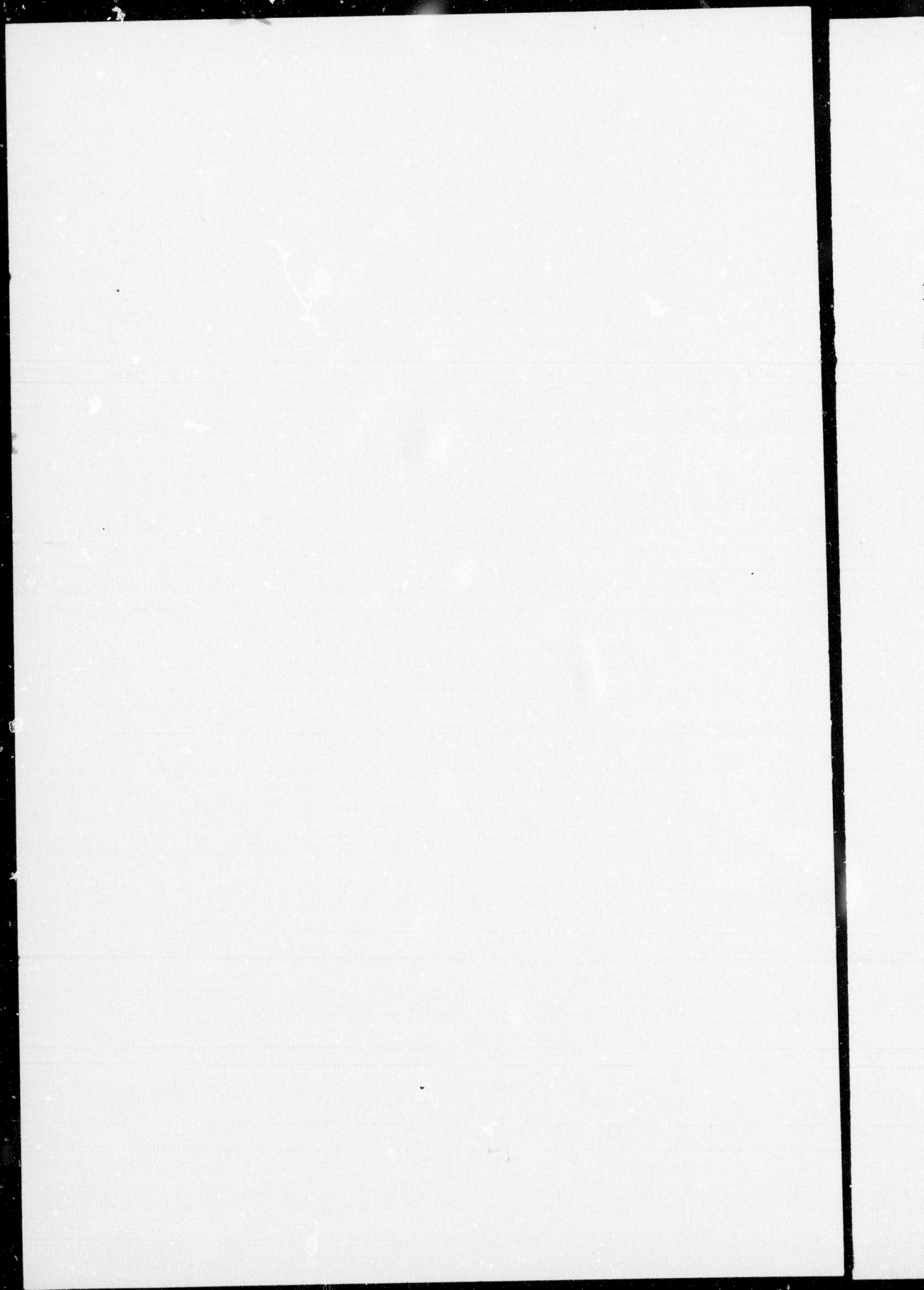


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JERRY DE FEO,

Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The appellant Public Mutual Insurance Company ("Surety") and the appellant-indemnitors Anthony Catino, Theresa Peduto, Mary Mariccio and Jerry De Feo ("Indemnitors") appeal from the decision and order (App. 45)* of the Honorable Milton Pollack, United

* References in the form "App. —" refer to the joint appendix of the appellants; "Br." refers to the brief of the designated appellant.

States District Judge for the Southern District of New York, entered on March 9, 1977, granting the Government's application for a forfeiture of the defendant Alfred Catino's \$50,000 bail bond posted by the surety.

Statement of Facts

On September 20, 1973, Indictment 73 Cr. 881 was filed charging the defendant Alfred Catino and others with violating the federal narcotics laws, Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and 846. On September 27, 1973 the Indictment was unsealed and the Honorable Thomas Griesa, United States District Judge, set Catino's bail at \$50,000 cash or surety bond. Catino was remanded that day but released on September 28, 1973 when the Public Service Mutual Company posted a \$50,000 surety bond to obtain Catino's release. (App. 6-7).

Trial as to the defendant Catino and four others commenced on December 18, 1973 before the Honorable Milton Pollack, United States District Judge and a jury and concluded on January 8, 1974. The defendant Catino was convicted on Counts One and Two and bail in the amount of \$50,000 was continued until the time of sentence.

On February 26, 1974, Catino was sentenced by Judge Pollack to concurrent terms of imprisonment of twelve years on each of Counts One and Two to be followed by a special parole term of six years. Bail was continued, over the Government's objection, in the amount of \$50,000 pending his appeal.* The bail bond was not rewritten.

* Judge Pollack only continued bail pending appeal after pressing Mrs. Rosner, counsel for Catino and now counsel for the indemnitors, for information about the sufficiency of the \$50,000 bail then set. The colloquy was as follows:

[Footnote continued on following page]

Catino's conviction was affirmed in *United States v. Mallah*, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975), and Catino was noticed to surrender on March 17, 1975. On that date, the defendant Catino failed to appear and a bench warrant was issued for his arrest.

"Mrs. Rosner: May we speak to the question of bail?

The Court: What is his present bail?

Mrs. Rosner: He is currently at large on \$75,000—I am sorry—\$50,000 bail, all of which is secured by collateral provided by friends and relatives. One such collateral is the residence of his cousin, your Honor. I think it would be appropriate to note, Judge, although Mr. Catino has had prior conflicts with the law, there has never been a scintilla of evidence that he is the type of man prone to become a fugitive.

The Court: I take it you are talking about pending appeal?

Mrs. Rosner: Yes, your Honor.

* * * *

The Court: What is the financial condition of the defendant?

Mrs. Rosner: He is virtually indigent. He possesses no assets.

The Court: How good is that bail collateral?

Mrs. Rosner: It is all provided by friends and relatives.

The Court: Is it realistic bail?

Mrs. Rosner: Mr. Catino has been in this posture before. He has faced serious charges in this courthouse on which he was acquitted.

The Court: Is the bail realistic?

Mrs. Rosner: Your Honor, in my judgment, the bail is more than ample.

The Court: What does the collateral consist of?

Mrs. Rosner: There is a residence belonging to a cousin of Mr. Catino, there are life savings of several other relatives and friends in the form of bank books.

The Court: How much money?

Mrs. Rosner: \$33,000 in cash.

The Court: In the savings bank?

Mrs. Rosner: From several people.

The Court: Bail of \$50,000 is continued pending appeal on the basis the defendant will proceed promptly." (App. 24-26).

By notice of motion filed on February 14, 1977, the Government moved to have Catino's bail forfeited and a judgment entered against the surety for \$50,000. The surety company and the indemnitors responded to the Government's motion asserting that the bail bond was exonerated on the date that Catino was sentenced. Judge Pollack heard oral argument on February 28, 1977, and on March 9, 1977, he issued a decision and order granting the Government's application for forfeiture. This appeal followed.

ARGUMENT

POINT I

The District Court Properly Ordered Forfeiture of the Bond.

Appellants do not dispute that defendant Catino became a fugitive on March 17, 1975, when he failed to surrender to commence serving his sentence. Appellants contend, however, that the surety was exonerated when Catino appeared for sentencing on February 26, 1974 and, therefore, that Catino's \$50,000 bail bond should not be forfeited. Alternatively, appellants argue that holding the surety liable for bail pending appeal constituted a material modification of the bond's provisions and that the bond by its terms was solely a district court bond which, despite the fact that the amount of bail was not enlarged by the district court pending appeal, had to be rewritten as an appeal bond before Surety could be held liable. Appellants' claims are wholly without merit since the bond by its very terms states that it continues in effect until exoneration and there was no exonerating act prior to Catino's violation of the bond's conditions.

Appellants' first contention, namely, that Catino's appearance for sentencing in February 1974 exonerated the surety under the terms of the bond, fails to recognize that the actual terms of the bond contain no such exonerating provision. Instead, the bond at issue here includes two significant provisions which do not appear in the Standard Form 17 to the Federal Rules of Criminal Procedure:

"The defendant is to abide any judgment entered in [the above entitled] matter by surrendering himself to serve any sentence imposed and obeying any order or direction in connection with such judgment as the court imposing it may prescribe;"

"It is agreed and understood that this is a continuing bond which shall continue in full force and effect until such time as the undersigned are duly exonerated." *

Federal courts ** have repeatedly held that in the absence of an explicit exonerating provision in the bond itself, the pronouncement of sentence does not automatically exonerate the surety. Rather, where "the bond states that the principal is to surrender himself for execution of the sentence and to abide by orders of the court in connection with judgment, the pronouncement of sentence does not exonerate the surety" *United States v. Miller*, 539 F.2d 445, 448 (5th Cir. 1976). See also *United States v. Gonware*, 415 F.2d 82 (9th Cir. 1969); *Detroit Fidelity & Surety Co. v. United States*, 36

* The text of the bond is set forth in the appendix to Judge Pollack's opinion. (App. 55).

** In light of the "pervasive federal regulation of federal bail procedures and conditions," the court below followed the recent decision of the Fifth Circuit in *United States v. Miller*, 539 F.2d 445 (1976) and applied federal law in interpreting the terms of the bail bond at issue here. Appellants do not contend that state law is applicable.

F.2d 682 (6th Cir. 1930); *United States v. Wray*, 389 F. Supp. 1186 (W.D. Mo. 1975); *United States v. Widen*, 38 F.2d 517 (N.D. Ill. 1930).*

Appellants seek to distinguish *Miller*, *Gonware* and *Wray* on several grounds, all of them frivolous. They first argue that those cases are confined to the circumstances where execution of the sentence is stayed for a brief period of time to allow a defendant to put his affairs in order, in contrast with the more extended time, and thus extended risk, where defendant is freed pending appeal. Appellants fail to recognize, however, that the same factor claimed to increase the surety's risk during the pendency of the appeal—principally the increased chance of flight since defendant knows he has been convicted and is not being placed on probation—is precisely the same as the surety's risk when execution of sentence is stayed.

Surety also contends that the district courts in *Miller*, *Gonware* and *Wray* retained jurisdiction over the matter during the stay of execution of sentence—and thus the bond was held as security for the defendant's appearance—whereas the district court below lost all jurisdiction over the case once the notice of appeal was filed.** It is clear, however, that:

* *United States v. D'Anna*, 487 F.2d 899 (6th Cir. 1973) which is relied upon by Surety, is not authority for the contrary view, since the Sixth Circuit there explicitly followed Michigan law, which does hold that appearance at the time of sentence automatically exonerates the surety. Moreover, the bond at issue in *D'Anna* did not contain either of the provisions significant here.

** The authorities cited by appellants, *United States v. Brizuela*, 508 F.2d 386 (9th Cir. 1974), and *United States v. Kirkman*, 426 F.2d 747 (4th Cir. 1970) do not even address the issue, much less support appellants' argument concerning the supposed distinction between trial and appeal bonds.

"[t]he filing of a notice of appeal, although transferring jurisdiction over the case from the district court to the Court of Appeals, does not render the district judge powerless or without jurisdiction to enforce the conditions of a bond under which defendant has been released pending appeal. The court retains jurisdiction over the person of the defendant at least for the limited purposes of reviewing, altering or amending the conditions under which that court released the defendant, and is empowered to revoke or forfeit the defendant's bond during the pendency of an appeal for any of the reasons which would have supported an initial denial of the defendant's application for release." *United States v. Black*, 543 F.2d 35, 37 (7th Cir. 1976).

See 18 U.S.C. § 3148 and Fed. R. App. P. 9(b). Appellant's attempted distinction must thus fall.

Despite a total absence of authority, indemnitors claim that the continuance of the bond through the appeal was a material modification of the contract, thus constituting exoneration in the absence of consent by the surety to the alteration. The argument, as Judge Pollack noted, flies squarely in the face of the clearly expressed agreement that the bond is a continuing one. As the court below stated:

"This refutes the indemnitors' modification argument, because the bond by its terms was to remain in force until exoneration and production of a principal for sentencing does not constitute exoneration. By the express terms of the instrument payment of the amount of the bond became due upon Catino's failure to surrender when ordered by the District Court. Leaving the bond effective during the period of the appeal was no

modification thereof; pursuant to the continuing bond provision the bond remained in force in the absence of some prior act of exoneration." *

POINT II

The District Court Properly Denied The Surety's Offer of Proof and Alternative Request for an Evidentiary Hearing.

In its papers in opposition to the Government's motion for forfeiture of the bail bond and at the time of argument on the motion, the Surety made an offer of proof concerning the practice in the District Court Clerk's Office in the Southern District of New York with respect to preparing separate appeal bonds. Appellants' contend that such testimony would show that customary procedures were not followed in this case and that such procedures are relevant to the interpretation of the terms of the bail bond itself. Appellants' claims are wholly lacking in merit since the proffered testimony was, at best, of the most general and conclusory nature.** More im-

* Fed. R. Crim. P. 46(f) provides that "When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody." In the present case there was no timely surrender of Catino into custody, and no cash deposit. The colloquy following sentencing demonstrated that the Court did not exonerate the obligors or release the bail, and *Miller, supra*, holds that it was not required to do so.

** Indeed, the brief of the Surety is replete with general, sweeping assertions, *e.g.*, that the surety "in many instances . . . will not write an appeal bond even though [it has] written a trial bond." (Surety Br. 3). Yet *nowhere* in the record does the Surety claim that it would not have rewritten an appeal bond in the same amount of bail for the defendant Catino. Indemnitors—friends and relatives of Catino—similarly fail to make that assertion.

portantly, as Judge Pollack specifically noted, testimony concerning a "practice that relates to unequivocal, unambiguous expressed language in an instrument of undertaking" is irrelevant as a matter of law. [App. 42].

As an examination of the record makes clear, the testimony of District Court Clerk Eddie Aponte was proffered solely for the purpose of demonstrating that it is Aponte's practice to rewrite a standard form trial bond to a standard form appeal bond in instances where a defendant has been admitted to bail pending appeal—a procedure which, accordingly to appellant's offer of proof (Surety Br. 3) is initiated by the forwarding of papers by the Surety to the clerk's office. The offer of proof was notably deficient in several respects. For example, there is no claim that the instant bail bond written by the surety is a standard form customarily rewritten to an appeal bond. Indeed, as Judge Pollack noted, the two key provisions of the bond at issue here—the continuing obligation and the agreement to abide any judgment and obey any order or direction in connection with such judgment—are *not* contained in standard form 17 to the Federal Rules of Criminal Procedure. Moreover, insofar as the Surety also contends that Aponte's practice in turn were based on practices established and approved by the judges of the Southern District (Surety Br. 6) it was unnecessary to present such testimony to a member of that body.

More specifically, it is clear that an evidentiary hearing was uncalled for, since the motion for forfeiture of the bond raised solely a question of law: whether the Surety's liability on a bail bond contract terminated with a pronouncement of sentence on Catino, even though the bond is, by its own terms, continued and even though it contains a specific condition requiring the defendant to obey any judgment entered by surrendering himself to

serve any sentence imposed. *United States v. Wray*, 389 F. Supp. 1186, 1190 (W.D. Mo. 1975). Federal law is clear that such liability did not terminate; indeed it could only have so ended in the *absence* of such conditions in the bonds. *United States v. Miller*, 539 F.2d 445, 448 (5th Cir. 1976); *United States v. Wray*, *supra* at 1190.

While appellants do not dispute that the extent of the surety's undertaking depends almost entirely on the wording of the bail bond contract itself, *United States v. Miller*, *supra*, at 447, and further concede, indeed insist, that the language of the bond is free of all ambiguity (Indemnitors' Br. 4), they nevertheless contend that Judge Pollack erred in not accepting evidence of customary practice as bearing on what the parties to this contract reasonably intended.* Appellants, however, cannot even agree as to the ultimate bearing of the proffered testimony on the issue of interpretation of the bail contract. The Surety insists it shows the parties intended that the Surety be exonerated on the day of sentence (Surety Br. 8-9), while indemnitors contend that the parties intended the

* While, some courts have looked to certain common practices, e.g., *United States v. Wray*, *supra* (in connection with whether it was reasonable for Surety to have expected notice) and *United States v. Miller*, *supra* (alternate ground of holding), the relevant practices looked to were those of the court, in connection with bail and sentencing. Thus, in determining whether the Surety is exonerated on the day of sentence, despite the presence of provisions in a bond such as those at issue here, the fact that it is customary to stay execution of sentence to permit defendants to organize their affairs may be of some consequence. E.g., *United States v. Miller*, *supra*. In a similar vein, evidence in the instant case that it is customary on the day of sentence for defendants to request, and for District Courts in the Southern District of New York to continue defendants on bail on pending appeal, often in the same amount, may bear on what the parties could or should have reasonably intended in a continuing obligation bond.

Surety remain obligated after the date of sentence up to some date as to which even indemnitors remain uncertain (Indemnitor's Br. 6-8).

In any event, it was unnecessary for the District Court to hear testimony bearing on the reasonable intentions of the parties to the contract. Indeed, in the face of the clearly expressed language of the contract, to do otherwise would have been an improper attempt to rewrite the contract for the parties. *See, e.g., Rodolitz v. Neptune Paper Products, Inc.*, 22 N.Y. 2d 383, 386 (1968). Thus, as Judge Pollack expressed below:

"Contemplation by the parties relates to ambiguity and does not relate to express conditions.

I could no more impose additional terms on the surety because its contemplated in the District than I can to subtract terms from the bond on the ground of contemplation. There has been no reformation of the terms of this bond." (App. 41).

POINT III

Even Assuming Terms of the Bail Bond were Modified, Appellants Waived any Objections and Acquiesced Therein.

Assuming *arguendo* that the bail bond at issue should have been rewritten as an appeal bond and, as a consequence, continuing the Surety's liability on the bond constitutes a material modification of its terms, both Surety and indemnitors have long waived any objections.

Defendant Catino appeared for sentencing on February 26, 1974, at which time his request to remain on \$50,000 bail was granted by Judge Pollack. His conviction was affirmed by this Court and Catino was subsequently ordered to surrender to commence serving his sentence on March 17, 1975. He then became a fugitive.

At no time during the one year period that Catino was free on bail did the Surety seek to have the bond rewritten, surrender the defendant to the custody of the Government or in any way raise objection to continuing the bail status of defendant Catino under the original bail bond. The Surety had ample notice and opportunity to do so, and, by its failure to raise any objection, can only be considered to have waived all objections and acquiesced in the change.

It is long-established that, in the absence of a specific provision in the bail bond requiring notice to a surety, a surety need not receive actual notice of orders or directions affecting the defendant. Instead, notice to a defendant is imputed or implied notice to his surety. *United States v. Egan*, 394 F.2d 262 (2d Cir.), cert. denied, 393 U.S. 838 (1968); *Stuyvesant Ins. Co. v. United States*, 410 F.2d 524 (8th Cir.), cert. denied, 396 U.S. 836 (1969); *United States v. Wray*, 389 F. Supp. 1186 (W.D. Mo. 1975); *United States v. Caro*, 56 F.R.D. 16 (S.D. Fla. 1972). Alternatively, the surety must discover any change in the bail terms, if granted at the defendant's request, by checking the court docket directly. *United States v. Egan*, supra. The Surety thus clearly had the requisite knowledge concerning the continuation of defendant Catino's bail status pending appeal.

Similarly, indemnitors in the instant case, to the extent, if any, that they have standing to raise the issue, also had actual or, at the very least, imputed knowledge concerning the defendant's bail status. As defendant's attorney, Nancy Rosner, represented to the District Court, the indemnitors are relatives and friends of Catino—and thus capable of exerting moral suasion on the defendant. (App. 47). By the same token, it is not unrealistic to conclude that friends and relatives sufficiently close to Catino to pledge life savings and homes as collateral were kept apprised by the defendant of his bail status. Moreover, as this Court has previously noted, where the in-

demnitors are represented here by the same counsel who represented Catino, it may be inferred that indemnitors received notice. *United States v. Egan, supra* at 267. Cf. *Continental Casualty Co. v. United States*, 337 F.2d 602 (1st Cir. 1964).

In sum, it is patently obvious that having had notice of the purported material modification, neither the Surety nor the indemnitors raised the slightest objection. Indeed, the record can be searched in vain for any statement by the Surety that it would not have acted as surety for Catino pending appeal, or, similarly, by indemnitors. Despite its now belated claim that the chance of flight materially increases after conviction pending appeal, the Surety at no time during the entire one year period before Catino became a fugitive sought itself to rewrite the bond, or sought to have Catino report regularly to it, or sought to arrest Catino and surrender him to the custody of the Government, pursuant to 18 U.S.C. § 3142 and Rule 46(g) of the Federal Rules of Criminal Procedure. On the contrary, it is clear that both the Surety and indemnitors acquiesced in the change and, having done so, are now estopped from claiming the contrary. See *United States v. Egan, supra*.

CONCLUSION

The order of forfeiture should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

JANE W. PARVER,
JAMES P. LAVIN,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Jane W. Parnes being duly sworn deposes
and says that she is employed in the office of the United States
Attorney for the Southern District of New York.

That on the 3rd day of June 3, 1977
she served a copy of the within brief by placing the same in a
properly postpaid franked envelope addressed:

Nancy Rosner, Esq
401 Broadway
New York, NY 10013

H. Elliot Wales
122 East 42nd Street
New York, N.Y. 10017

And deponent further says that she sealed the said envelope and
placed the same in the mail box for mailing at the United States
Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Jane W. Parnes

Sworn to before me this

3rd day of June, 1977
Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978

